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86-886

No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

LINDA AUGUSTUS *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, CITY OF CHICAGO,
FRATERNAL ORDER of POLICE,
RENAULT ROBINSON, AND
AFRO-AMERICAN PATROLMEN'S LEAGUE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Title VII authorize a district court to implement a numerical remedy for racial discrimination which favors black males over black females?

2. Does the "timeliness clock" on a petition to intervene as a matter of right start to run while the petitioning intervenors' interests are adequately represented?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari

1. Petitioners, 12 black female police officers, are Linda C. Augustus, Ladys L. Barlow, Michelle M. Bowen, Doris M. Byrd, Beverly A. Giles, Dorothy M. Green, Jacquelyn B. Kimber, Doris Martin, Mary Ann Rozell, Eldora M. Silverman, Marva O. Smith, and Flora L. Wilson.

issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 7, 1986.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-12) is reported at 796 F.2d 205 (7th Cir. 1986). The oral opinion of the district judge (App. 16-17) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 13) was entered on July 7, 1986; petitioners' timely petition for rehearing was denied by the court of appeals on August 27, 1986. (App. 14.)

RULE INVOLVED

This case involves Rule 24(a) of the Federal Rules of Civil Procedure which provides as follows:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protest that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

1. In 1976, the district court concluded that the City of Chicago had discriminated against black, Hispanic, and female police officers in promotions to the position of sergeant in its police department. *United States v. City of Chicago*, 411 F.Supp. 218 (N.D.Ill. 1976). As part of its remedy, the district court ordered that a quota be superimposed on the list prepared from the 1973 sergeant's test: black and Hispanic officers were placed on a separate list and the City was ordered to make 4 out of each 10 promotions from this minority list. *Id.* at 250. The district court did not set a separate promotional quota for women, but expressed its willingness to consider "upon appropriate motion" an "appropriate goal for promotion of females to the rank of sergeant . . . when a sufficient number of females are available in the patrol officer rank." *Id.* at 251.

2. The Seventh Circuit affirmed the district court's finding of discrimination and its use of a quota remedy. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977). With respect to a challenge to the hiring quota for women, the court of appeals deferred to the district court's "discretion . . . to correct any underrepresentation of females that has become apparent since its final decree." *Id.* at 437.

3. The City offered a new promotional examination in 1979. The district court eventually concluded that this test was discriminatory because it had not been properly validated and because it had a "profound adverse impact upon blacks, hispanics, and women." (Mem.Op. April 1, 1984.)

4. Before adjudication of the invalidity of the 1979 test and pursuant to an *en banc* decision of the Seventh Circuit, *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981), the City was permitted to use its 1979 test subject to a minority/female quota: Black and Hispanic males were placed on one list and female officers—irrespective of their race—were placed on another list. "The [district] court viewed this arrangement as temporary until a full evidentiary hearing could be held on the validity of the 1979 sergeant's exam." (App. 5.)

5. The district court continued in effect the temporary 25% "minority male" quota and a 5% female quota following its adjudication of the invalidity of the 1979 test in April of 1984. (App. 5.)

6. Petitioners, a group of black female police officers, sought to intervene in November of 1984 to secure a modification of the quota remedy for any additional promotions which would be made from the discriminatory test. Petitioners pointed out in their intervention papers that treating black women as "females" rather than as "black" or as "black *and* female" was unfair to black women because white female police officers had outperformed black females on the 1979 test, i.e., black females were at the bottom of the consolidated "female list." In addition, petitioners showed that two black females (instead of two black males) would have been promoted if all black officers had remained on a single minority list.

7. On May 31, 1985—while the petition to intervene was pending before the district court—the City made 79 promotions to the position of sergeant. (Record Item No. 1302.) 19 of those promoted were black males; not one was a black female. Each of the black males promoted to sergeant had received a lower score on the test than petitioners Mary Rozell and Doris Byrd, black females. But because they had been classified as "females" rather than as "blacks," Rozell and Byrd were passed over in favor of black males.[2]

8. The district court denied the petition to intervene "[u]pon the grounds that [petitioners'] positions have previously been adequately represented, and upon the grounds that their position — the assertions that they make are made in an untimely fashion." (App. 17.)

9. The court of appeals affirmed, concluding that "intervention would have been most appropriate [before the district court's decision on the merits in 1984]." (App. 10.) As an alternative holding, the court of appeals upheld the district court's finding that petitioners' interests were adequately represented. (App. 11.) The court of appeals acknowledged that it is "difficult to see who represents the interests of black females" (App. 12), but deferred to the district judge because he "has been immersed in the issues of this case for more

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2. Petitioners were unsuccessful in their attempt to block these promotions pending disposition of their application for intervention.

than a decade." (Id.)

REASONS FOR GRANTING THE WRIT

This case raises important questions about judicial review of "promotional goals pending the development of nondiscriminatory... promotion procedures." *Local 28, Sheet Metal Workers v. EEOC*, ___ U.S. ___, 106 S.Ct. 3019, ____ (1986).

The promotional procedure underlying this case has a double-barreled discriminatory impact on black females: whites applicants outperformed black applicants, and males outperformed females. White males did better than white females, who did better than black males, who did better than black females.

The race-conscious remedy adopted in this case affords special consideration to black males but lumps black females together with white females. The result is that the remedy for sex discrimination undoes the remedy for race discrimination — black males are promoted ahead of black females who did as well on the discriminatory test solely because of a specific mathematical ratio for female promotions. Certiorari should be granted to review the decision of the court of appeals approving this injustice.

-I-

The decision of the court of appeals that "intervention would have been most appropriate" in 1981 (App. 10), before the district judge had concluded that the sergeant's test was discriminatory is in conflict with the general rule that the "timeliness clock" for intervention of right starts to run when the prospective intervenor's interests cease being adequately

represented. *NAACP v. New York*, 413 U.S. 345, 367 (1973); *United States v. American Telephone & Telegraph Company*, 642 F.2d 1285, 1294 (D.C. Cir 1980); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-65 (5th Cir.1977).

Petitioners sought to intervene to challenge the relief which had been fashioned by the district court following its decision on the merits. Petitioners' right to intervene was contingent on two events:

- The decision by the district court that the test is discriminatory, and
- The refusal of the original parties to seek a remedy for the double-barreled discriminatory impact of the test on black females.

Neither of these events occurred in 1981, when the court of appeals believed that petitioners should have intervened. (App. 10.) The district court ruled on the merits in April of 1984, and it was not until sometime thereafter that it became apparent that none of the parties would seek a remedy appropriate for black females. It was at that time that "the timeliness clock began to run for the motion to intervene." *Association of Prof. Flight Attendants v. Fincher*, ___ F.2d ___ (5th Cir., No. 86-1017, Nov. 17, 1986).

The conclusion of the court of appeals that "intervention would have been most appropriate" (App. 10) before the district court's ruling on the merits warrants review by this Court.

-II-

Likewise warranting review by the Court is the decision of the court of appeals that petitioners' interests were adequately represented.

The district court was unable to identify which party had represented petitioners' interests. The court of appeals agreed that "[i]t is difficult to see who represents the interests of black females." (App. 12.) Nonetheless, the court of appeals refused to reverse the denial of intervention or to remand for more specific findings. The court of appeals' only explanation for this result was to observe that the district judge "has been immersed in the issues of this case for more than a decade." (App. 12.) This is insufficient to permit black female police officers to be passed over for promotion in favor of black males, especially when none of the parties in the litigation — not the United States, not the defendant City of Chicago, not the Afro-American Patrolmen's League, and not the Federation of Police — had represented petitioners' interests by pointing out to the district court that the quota remedy favored black males over black females.[3]

In *Local 28, Sheet Metal Workers v. EEOC*, ___ U.S. ___, 106 S.Ct. 3019 (1986), the Court approved the use of "interim . . . promotional goals pending the development of nondiscriminatory . . . promotion procedures." 54 U.S.L.W.

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3. Each of these parties—except for the Afro-American Patrolmen's League, who did not take a position—opposed intervention by petitioners.

at 4991. Because a numerical remedy is intended to permit "continued use of a discriminatory selection procedure" id., it is essential that the quota not itself be discriminatory.

It is likewise essential that competing interests be adequately represented when a numeric remedy is being fashioned. When, as here, victims of discrimination come forward and show that they are actually being held back by a quota remedy, the courthouse door should be open to correct this injustice. "[J]udicially imposed remedies must be open to adaption when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accomodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom." *New York State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983).

This Court should not permit black female police officers to be passed over for promotion in favor of black males for no better reason than that the district judge "has been immersed in the issues of this case for more than a decade." (App. 12.)

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

November, 1986

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-2027 and 85-2056

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

APPEALS OF:
LINDA AUGUSTUS, *et al.* and
SUZANNE BAKER, *et al.*,

Petitioning-Intervenors.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 2080—**Prentice H. Marshall**, *Judge.*

ARGUED JANUARY 21, 1986—DECIDED JULY 7, 1986

Before CUMMINGS, *Chief Judge*, BAUER and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* This consolidated appeal concerns two sets of parties that seek to intervene in the longstanding litigation involving the hiring and promotion practices of the Chicago Police Department. In 1976, the district court for the Northern District of Illinois found that these practices discriminated against black and Hispanic men and against women. New tests have since been

offered. The group of proposed intervenors led by Suzanne Baker (the "Baker petitioners") are 34 black and white women and white men who passed the 1981 hiring exam but have not been called to the assessment center—the second stage of the hiring process. They seek to enjoin the City from offering a new patrol officer's test until all those who passed the 1981 exam have been hired. The group of petitioners led by Linda Augustus (the "Augustus petitioners") are minority women who passed the 1979 sergeant's exam but have yet to be promoted. In 1982, the district court determined that minority women would be counted as women and not as racial minorities for purposes of the promotion quotas designed to remedy the disparate impact of the 1979 sergeant's exam. The Augustus petitioners claim that this classification system has prevented minority women from being promoted and has delayed the remedying of racial discrimination. The district court denied both groups' petitions to intervene.

In order to understand the current posture of the litigation it is important first to have some understanding of its background.

A. Hiring Facts

In 1973 the United States filed suit against the City of Chicago to correct discriminatory hiring and promotion procedures in the Police Department. The government case was consolidated with a pending case brought by black police officers (the "Robinson plaintiffs"). Various parties were later allowed to intervene. The district court first issued a preliminary injunction[1] and entered a final decree on February 2, 1976 finding the Police Department guilty of race and sex discrimination in violation of Title VII, 42 U.S.C. § 2000(e). *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976). The court found that

[1] *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974).

the 1971 patrol officer's exam, upon which the hiring roster was then based, had a disparate impact against minorities and women and was not shown to be job related. To correct the resulting imbalance, the court ordered that 42% of all future patrol officer vacancies be filled by black and Hispanic males and 16% by females. On appeal, this court upheld the finding of discrimination and the use of quotas. This court, however, reversed the district court's determination that the City could disregard the existing eligibility roster once the minority and female quotas had been met. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S. Ct. 225 (1977).

In 1975 the City offered a new exam. In August 1976, the City submitted to the district court a new roster based on this test. The district court found this roster to be fairly representative of the pool of applicants. The court therefore suspended the mandatory hiring quotas it had ordered earlier.[2] 420 F. Supp. 733, 736 (N.D. Ill. 1976), *aff'd*, 567 F.2d 730 (7th Cir. 1977), *cert. denied*, 436 U.S. 932, 98 S. Ct. 2832 (1978). Between 1976 and 1981, the hiring of patrol officers proceeded without the use of mandatory quotas.

Another exam was offered in 1981. The City proposed and the district court approved treating this exam as a "pass-fail" test and hiring passing applicants according to a quota of 34% white males, 35% minority males and 31% females.[3] No party sought to intervene to protest these hiring goals. The Baker petitioners were part of the 3,000

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[2] The City submitted a roster that was 50.2% white male, 25.8% black and Spanish surnamed, and 23.9% female compared to an applicant pool that was 45.4% white male, 28.6% black and Spanish surnamed and 25.9% female.

[3] 16,733 individuals took the 1981 exam. Of those, 61% were black and Hispanic while 39% were white or others. 41% of blacks and Hispanics passed the exam while 59% of the white and other group passed. Because of this disparity, the City sought the use of a quota.

people who had passed the 1981 exam but remained on the notification list to be called to the assessment center. Before this court, the Baker petitioners argue that they did not seek intervention earlier because they expected to be called eventually. They argue that they intervened as soon as they learned the City planned to discard the 1981 exam, that the City apparently seeks to offer a new exam only because the 1981 eligibility list has been exhausted of minorities and that, in light of the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984), any future use of quotas may be unconstitutional.

B.

The 1976 district court decision also found the Police Department's 1973 exam for promotion to sergeant to have a disparate impact on minorities. That court therefore ordered that future promotions should be fairly representative of the labor force and imposed a mandatory quota for minorities of 40%. *United States v. City of Chicago*, 411 F. Supp. 218.[4] On appeal, this court ruled that after the 40% quota had been achieved, further promotions should be made in rank order from the 1973 list. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

In 1979, the City abandoned the 1973 list and offered a new promotion exam. After the 1979 list was prepared, the City and the Department of Justice asked the district court to permit promotions to be made from the test at approximate parity with the applicant pool, which would reduce the minority quota from 40% to 25%. Additionally, it asked the district court to create a separate 10%

[4] Initially, the district court did not set a separate promotional quota for females. However, it stated that "an appropriate goal for promotion of females to the rank of sergeant will be considered, upon appropriate motion when a sufficient number of females are available in the patrol officer rank." 411 F. Supp at 251.

quota for female promotions. The district court refused to modify the decree. On appeal, this court, *en banc*, reversed, determining that since the original promotional goals had been largely achieved[3], the minority quota should be reduced from 40% to 25%. The court also directed the district court to consider the desirability of a female quota since the female membership in the officer force had risen. *United States v. City of Chicago*, 663 F. 2d 1354 (7th Cir. 1981).

On remand, the district court adopted a five percent quota for all women. The court determined that black women were to be counted only on the female list and were to be stricken from the black list. The court viewed this arrangement as temporary until a full evidentiary hearing could be held on the validity of the 1979 sergeant's exam. The hearing was held in September 1983. In April 1984, the district court held the exam to be invalid and ordered that the 25% minority and 5% female quotas be kept in force.

The Augustus petitioners moved to intervene in November 1984. In February 1985, they filed an amended motion stating that since both black males and females scored lower than white females on the 1979 exam but black females are not counted as blacks, the quota arrangement fails to correct the racially discriminatory effect of the 1979 exam. They claim that had they been classified as blacks, two more black females would have been promoted.

In a hearing in June 1985, Judge Prentice H. Marshall denied both parties' petitions to intervene. Judge Marshall determined that the interests of both parties had already been represented in the litigation and that they were seeking to reargue issues already concluded. He also de-

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[3] The court found that the percentage of minorities in the sergeant force reasonably represented the percentage of minorities in the patrol officer force. *United States v. City of Chicago*, 663 F.2d at 1361 n.19.

termined that since the promotion and hiring lists had been in place for several years, the parties' motions were untimely.[6]

I.

Petitioners did not specify before the court below whether they were seeking permissive intervention under Federal Rule of Civil Procedure 24(b)or intervention as of right under Fed. R. Civ. P. 24(a)(2). The district court apparently considered the petitions under Rule 24(a)(2). Four requirements must be met before intervention will be granted as of right:

> The application must be timely. The intervenor must show an interest relating to the property or transaction which is the subject of the action. The intervenor must show that the disposition may as a practical matter impair or impede the intervenor's ability to protect that interest. And, the intervenor must show that the interest is not adequately represented by existing parties.

United States v. 36.96 Acres of Land, 754 F.2d 855, 858 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1956 (1986). Failure to satisfy even one of these requirements is sufficient to warrant a denial of a motion to intervene as a matter of right. *Commodity Futures Trading Commission v. Heritage Capital Advisory Services*, 736 F.2d 384, 386 (7th Cir. 1984).

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[6] Briefs in opposition to the Baker and Augustus petitioners' motions to intervene have been filed by the City of Chicago, the Robinson plaintiffs and the defendant-appellee Fraternal Order of Police. The United States, as plaintiff-appellee, has filed a brief opposing the Augustus petitioners' motion but supporting that of the Baker petitioners. The United States argues that the Baker petitioners raise a new issue—that it is unconstitutional to discard a hiring list because it has been exhausted of minority males. The United States also contends that the Baker petitioners could not have known their interests were jeopardized until the City announced in 1985 that it would jettison the 1981 list and claims that allowing the Baker petitioners to intervene would not prejudice other parties to the suit.

Here, the district judge offered two grounds for denying the petitions to intervene. First, he determined that the petitioners' motions were not raised in a timely fashion. The purpose of the timeliness requirement is to "prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). Therefore, "as soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation, he must move promptly to intervene." 710 F.2d at 396.

Questions of timeliness are within the discretion of the district court and will be reversed only for an abuse of that discretion. *United States v. Kemper Money Market Fund, Inc.*, 704 F.2d 389, 391 (7th Cir. 1983). Among the factors to be considered in determining whether a motion is timely are:

> 1) the length of the time the intervenor knew or should have known of his interest in this case, 2) the prejudice to the original party caused by the delay, 3) the resulting prejudice to the intervenor if the motion is denied, and 4) any unusual circumstances.

South v. Rowe, 759 F.2d 610, 612 (7th Cir. 1985).

Here, the Baker petitioners knew in 1982 that quotas would be imposed. They knew then that they would not be hired in rank order of their scores. In their brief before this court, they seem to concede that these facts gave them sufficient reason to seek intervention more than three years ago:

> The Baker intervenors have had their rights violated for the past several years while they were being passed over for purposes of employment by those with lower scores solely on the basis of race when there was no proof ever presented that these same individuals were the victims of discrimination nor even that the test itself was discriminatory.

Baker Petitioners' Br. at 12-13.

The Baker petitioners argue that even though they knew that they might suffer from delays in hiring they did not seek intervention when the quotas were first announced because they thought they would ultimately be hired:

> The intervenors did not seek intervention simply because there was no reason to. All had passed the exam and all had done well. Even though quotas might mean that some of the white male applicants might be called at a later point than otherwise they might have, it also meant that they were insured of becoming patrol officers at some point. Of course, the quotas assisted Suzanne Baker and the other female intervenors.

Baker Petitioners' Br. at 7-8. However, the Baker petitioners never state why they thought they were "insured" of being hired.[7] Nothing in the record indicates that the City promised to hire all those named on the eligibility list. The Baker petitioners point to no case where a city was required to maintain an eligibility list until all names had been exhausted. On the contrary, this court's earlier decision in *United States v. City of Chicago*, 567 F. 2d 730, 733 (7th Cir. 1977), *cert. denied*, 436 U.S. 932, 98 S. Ct. 2832 (1978), should have alerted them that the City could and would periodically throw out an eligibility list.

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[7] The United States argues that the Baker petitioners' motion to intervene is timely because "they had no reason to expect that the list would be exhausted of black males *before* it was exhausted of white males and females." United States Br. at 24. Since white males, females and minority males appeared on the eligibility list in roughly the same percentages, the United States argues, the Baker petitioners had reason to assume that no group would be exhausted before any other. But the fact that the Baker petitioners had some basis for assuming they would ultimately be hired does not justify their waiting until this assumption was proved wrong to intervene. They knew their interests were compromised when the quotas for the 1981 exam were first introduced and the rank ordering of scores—which favored nonminorities and had a disparate impact against minorities—was disregarded.

That they mistakenly assumed this would not happen to them does not entitle them to enter the lawsuit more than three years after the quotas had been imposed.

The Baker petitioners seem to concede that the City could discard an eligibility list because it is stale. *See* Baker Petitioners' Br. at 7. They contend, however, that "there was no argument below that the test was stale," *Id.*, and that "[t]he only argument was that the City had exhausted its quota of qualified Hispanic and Black male applicants and, hence, a new exam was required." This, they suggest, was an unconstitutional basis for discarding the list. They argue that they sought intervention as soon as they became aware of the City's intentions. However, nothing in the record suggests that the absence of minorities was the City's reason for discarding the 1981 list. Rather, in its Memorandum in Opposition to the Baker Petition to Intervene at 5 (N.D. Ill. May 21, 1985) the City argued "The City is authorized to remove eligibility lists which are no longer viable and the City has frequently removed stale eligibility lists in the past." While the attorney for the Robinson plaintiffs stated before the district court that the absence of minorities is a basis for discarding the list, *see* Transcript of Proceedings, Baker Petitioners' Appendix at 7, this represents the views of one group of plaintiffs in their suit against the City and cannot be read as the City's views. Moreover, even if the City *did* discard the list because it was exhausted of minorities, this would be consistent with the dictates of the 1982 consent decree, which required a hiring ratio of 35% minority males, 34% white males, and 31% females. This ratio could not be complied with once the eligibility list was exhausted of minorities. To challenge the City's right to seek a new pool of minorities, then, necessarily involves a challenge to the legitimacy of the consent decree. As such, it is an issue that could have been raised when the consent decree was approved in June, 1982 and is now untimely.

Further, the Baker petitioners cannot overcome their tardiness by claiming that they did not appeal earlier be-

cause until *Firefighters v. Stotts*, 467 U.S. 561, 104 S. Ct. 2576, was decided by the Supreme Court they thought "any intervention arguing that quotas were unconstitutional would be a futile act." Baker Petitioners' Br. at 9. The shifting sands of case law and the odds of victory or defeat are not among the factors courts ordinarily weigh heavily in assessing timeliness. Therefore, we cannot say the judge abused his discretion in denying intervention. Moreover, *Stotts* was decided on June 12, 1984. The Baker petitioners did not file for intervention until May 6, 1985. They offer no explanation why, if they thought *Stotts* afforded them new rights, they waited almost one year to pursue them.

Similarly, Judge Marshall acted within his discretion in denying the Augustus petitioners' motion to intervene. After the results of the 1979 Sergeant's Exam were announced, they knew that there would be only a limited number of promotions and that their scores were low. Once the district court ruled in July 1980 that the City could keep in force the 1976 promotional quota for minorities but could not have a separate quota for females—the one proposed would have double-counted minority women—the Augustus petitioners knew that no specific allotment had been made for black women. This court reversed the district court's determination in 1981 and directed the district court to "consider the desirability of an appropriate promotional quota for females, either to be counted separately from the minority quota, or, if appropriate, to be 'double-counted.' " *United States v. City of Chicago*, 663 F.2d at 1362. The Court of Appeals' decision thus specifically noted the alternative modes of treating minority women. And once this case was remanded, petitioners knew that the district court would issue a final ruling on the promotional status of minority women. This was the time when intervention would have been most appropriate, yet the Augustus petitioners waited over three years before seeking it.

Another important consideration in the timeliness calculus is the prejudice to the City and to aspiring police officers if the City cannot offer new tests. The 1981 hiring exam

is now five years old. Under similar circumstances, when considering the 1972 eligibility roster, this court was dubious of the validity of a five-year-old test in providing appropriate persons for patrolman duty. *United States v. City of Chicago*, 567 F.2d at 734.[8] We think there might be serious problems in requiring the City to use a potentially stale test, particularly since the City Personnel Code requires keeping an eligibility list for only one year. City of Chicago Personnel Rule VII, Section 3(d). Additionally, thousands of individuals have been waiting more than four years for the chance to become patrol officers. The City has already announced that they will have an opportunity to take a new exam. To continue to keep the 1981 eligibility list in force would jeopardize their interests as well. This is particularly inequitable since nothing prevents those still on the 1981 eligibility list from taking the new exam.

II.

Judge Marshall also found that the petitioners were raising claims that had been raised before and were adequately represented by other parties. He was not specific as to who represented these parties. However, there certain-

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[8] As the Court noted then:

> The underlying reason for allowing the civil service commission to have wide discretion to determine whether an eligibility list should be cancelled was explained in *People ex rel. Erickson v. Sheahan*, 24 Ill. App. 2d 43, 47, 163 N.E.2d 834, 836 (1960):
>
> > The policy behind this provision is to maintain an up-to-date register, the vitality of which may be guaranteed by the discretion placed in the commission to meet changing conditions and circumstances. Toward that end, the commission is authorized to strike a register which is no longer suitable to fulfill the function for which it was intended.
>
> Here the list involved is more than five years old, thereby raising some questions as to its validity in providing appropriate persons for patrolman duty.

U.S. v. City of Chicago, 567 F.2d at 734.

ly appears to be some overlap, for example, between what the Baker petitioners would argue and what the United States has recently urged. For instance, the United States has already advanced the argument of the Baker petitioners that *Stotts* bars the further use of quotas. One party need not advance the identical argument of another in order to adequately represent its interests.

It is more difficult to see who represents the interests of black females. However, because Judge Marshall has been immersed in the issues of this case for more than a decade, and particularly in light of the parties' lateness in seeking intervention, we cannot reject Judge Marshall's view out of hand.

Finally, any argument that petitioners should obtain permissive intervention must also fail. Timeliness is also a factor under Rule 24(b), and under that rule, permissive intervention is within the district court's discretion. Because it was his opinion that the petitioners would disrupt the flow of the litigation and rehash old arguments, Judge Marshall denied their motions. That denial was within his discretion. *United States v. 36.96 Acres of Land*, 754 F.2d at 860.

We are aware that these proposed intervenors have waited a long time to be employed or promoted. We can understand their disappointment that present policies affecting the Police Department do not favor their interests. Nonetheless we appreciate the Department's concerns for minimizing litigation and delay so that the ongoing operation of the Department will not be compromised.

For these reasons, the district court's denial of petitioners' motions to intervene is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 85-2027, 85-2056

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

APPEALS OF:
LINDA AUGUSTUS *et al.*, AND
SUZANNE BAKER, *et al.*

Petitioning-Intervenors.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.

[July 7, 1986]

JUDGMENT — ORAL ARGUMENT

HON. WALTER J. CUMMINGS, Chief Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 85-2027, 85-2056

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Appellees,

v.

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Petitioning-Intervenors.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.

[June 11, 1986]

ORDER

HON. WILLIAM J. BAUER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

This case is before the court on petition rehearing and suggestion for rehearing *en banc* filed by the Petitioning-Intervenors. On consideration of the petition for rehearing, the court on its own motion modifies footnote 6 on page 6 of the slip opinion as follows:

> The first two sentences of footnote 6 should be changed to read:
>
> "Briefs in opposition to the Baker and Augustus petitioners' motions to intervene have been filed by the

> City of Chicago and the defendant-appellee Fraternal Order of Police. The Robinson plaintiffs have filed a brief opposing the Baker petitoners but taking no position on the Augustus petitioners' motion. The United States, as plainitff-appellee, has filed a motion opposing the Augustus petitioners' motion but supporting that of the Baker petitioners. . ."

On further consideration of the petition for rehearing, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

No. 73 C 2080 *v.*

CITY OF CHICAGO etc.,
et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
[June 7, 1985]

BEFORE THE HONORABLE PRENTICE H. MARSHALL

The Court:

> [15] . . . we have had this open door policy, but I really believe that the issues that are presented by the petitions to intervene of the Baker group and the Augustus group are issues which are previously considered and which have been inherent in our situation all along, and that it would be unwise to permit intervention at this time for the purpose of relitiating those issues in the present context.
>
> Every intervenor who has come into this case has done so at a threshold point in the case. They have not come in asking to relitigate old issues. They have come in asking to be heard on pending issues. That has been true most recently of Mr. Gubbins. He arrived on the scene before the Bigby case was tried. He participated in the trial. He made known his position. He lost on his position. It's now pending in the Court of Appeals.

But it wasn't a question of re-examination. And in essence that is what the intervenor — the petitioner-intervenor Susan Baker and Linda Augustus seek to do.

Upon the grounds that their positions have previously been adequately represented, and upon the grounds that their position — the assertions that they make are made in an untimely fashion, the motions of Susan Baker et al., and Linda C. Augustus et al. to intervene are denied.

Supreme Court, U.S.
FILED
JAN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-886

In the Supreme Court of the United States

OCTOBER TERM, 1986

LINDA AUGUSTUS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the district court's denial of their motion to intervene, on grounds that the motion was untimely and that they were raising issues already considered by the court and adequately presented by other parties.[1]

1. a. In August 1973, the United States sued the City of Chicago, alleging that its police department's hiring and promotion practices discriminated against blacks, Hispanics, and women. In 1976, the district court found that the City had indeed so discriminated. *United States* v. *City of Chicago,* 411 F. Supp. 218, 225 (N.D. Ill. 1976), modified, 549 F.2d 415 (7th Cir.), cert. denied, 434 U.S. 875 (1977); see Pet. App. 1. As part of the relief, the court required the City to adopt a 40% quota for promotion of

[1] Petitioners also state that this petition raises issues regarding a "numerical remedy for racial discrimination" (Pet. 1; see also *id.* at 7, 9-10). Because both the district court and court of appeals denied intervention on Fed. R. Civ. P. 24(a) grounds, neither court addressed any remedial issue. The petition does not elaborate on such an issue either, except to note that by being classified as "females" rather than as "blacks," two petitioners were passed over notwithstanding that they received higher scores than any of nineteen black males who were promoted (*id.* at 6). Accordingly, we will not discuss the issue here.

black and Spanish-surnamed persons. The court declined to establish a quota for women at that time, stating that it would do so "when a sufficient number of females are available in the patrol officer rank" (411 F. Supp. at 250-251; Pet. App. 4).

In 1979, the City devised a new promotion list based on a new examination. Because the force's composition had improved, the United States and the City moved in June 1980 to reduce the minority quota to 25% and to establish a 10% quota for women. 663 F.2d at 1357-1358; Pet. App. 4-5. The district court denied the motion, but the court of appeals reversed and remanded in part. *United States* v. *City of Chicago,* 663 F.2d 1354 (7th Cir. 1981) (*en banc*). The court approved the reduction of the minority promotion goal from 40% to 25% (*id.* at 1362), and directed the district court to "consider the desirability of an appropriate promotional quota for females, either to be counted separately from the minority quota or, if appropriate, to be 'double-counted' " (*ibid.*). See also Pet. App. 5.

In June 1982, upon motion of the City and the United States, the district court established a "temporary" 5% quota for women, which would include black women, who would be stricken from the list of black candidates for promotion. The court stated that it would hold further proceedings to address allegations that the 1979 list was discriminatory, and that those who wished to be heard concerning, inter alia, a quota for women—including a separate quota for minority women—should appear at that time. The hearing was held in September 1983. In April 1984, the district court ordered that the established 25% black (excluding females) and 5% female (including blacks) promotion quotas be kept in force. See Pet. App. 5; 6/3/82 Hearing 7-8, 11-14, 16, 19, 21-22, 25-26.

b. Petitioners filed a motion to intervene in November 1984, and an amended motion in February 1985, alleging

that the separate 5% quota for women does not adequately remedy the discriminatory effect of the 1979 examination on black women (Pet. App. 5). At a hearing in June 1985, the district court denied the motion to intervene, holding that it was not timely filed and that it sought to relitigate resolved issues (*id.* at 16-17; see also *id.* at 5-6, 7, 11).

c. The court of appeals affirmed (Pet. App. 1-12). It noted that the determination of timeliness is within the district court's discretion and should be reversed only for an abuse of that discretion (*id.* at 7). The court of appeals pointed out that once the district court ruled in 1980 that there would not be a separate quota for women, petitioners were on notice that the interests they now seek to litigate were at issue. The court of appeals further pointed out that it had specifically remanded in 1981 for consideration of the issue of a separate quota for women, again identifying directly the issue which petitioners now seek to litigate. *Id.* at 10. The court concluded that the time immediately following the 1981 remand was the "most appropriate" time to intervene, "yet the Augustus petitioners waited over three years before seeking [intervention]" (*ibid.*). Relying primarily on the fact that "Judge Marshall has been immersed in the issues of this case for more than a decade," the court further stated that it would not reject the district court's finding that the "petitioners were raising claims that had been raised before and were adequately represented by other parties" (*id.* at 11-12).[2]

2. Petitioners claim that the court of appeals erred in holding that the district court did not abuse its discretion when it denied their motion to intervene. The court of ap-

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[2] The court of appeals also affirmed the district court's denial of another motion to intervene (filed by the "Baker petitioners"). Pet. App. 2, 7-10, 11-12. That affirmance is not at issue in the current petition.

peals was correct, however, and in any event its opinion is entirely factbound, applying only well-established and uncontroversial legal principles. This case presents no conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

Fed. R. Civ. P. 24(a) requires that intervention be permitted "[u]pon timely application" and "unless the applicant's interest is adequately represented by existing parties." The district court specifically found that petitioners' interests had been adequately represented (Pet. App. 11-12, 16-17). Certainly the issue of a separate quota for females and the treatment of minority females was considered repeatedly and explicitly beginning in 1980. The court of appeals, however, relied principally on the fact that petitioners had failed to intervene in a timely manner, although they had long known that their interests were at stake (*id.* at 10). That decision by the court of appeals presents no issue calling for this Court's consideration.

At least four separate times prior to their attempted intervention in 1984, events made clear that intervention concerning the treatment of black women would be appropriate. "[O]nce the district court ruled in July 1980 that the City could keep in force the 1976 promotional quota for minorities but could not have a separate quota for females—the one proposed would have double-counted minority women—the Augustus petitioners knew that no specific allotment had been made for black women" (Pet. App. 10). In 1981, the court of appeals directed the district court to "consider the desirability of an appropriate promotional quota for females, either to be counted separately from the minority quota, or, if appropriate, to be 'double-counted' " (663 F.2d at 1362). Thereafter, in 1982, the district court ordered a temporary 5% quota and made clear that it would be considering a separate quota for black women at the full hearing it then held in 1983. Petitioners did not move to intervene as a result of any of these

events, but only did so seven months after the district court issued its decision retaining the 5% promotion quota for women in April 1984.

Litigants are obliged to intervene when they learn their interests are at stake. See *NAACP* v. *New York*, 413 U.S. 345, 364-369 (1973); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.13, at 24-144 to 24-159 (1985 & Supp. 1986).[3] Clearly it was not an abuse of discretion to hold that petitioners, who waited until the litigation was over, have waited too long to assert their rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1987

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[3] Thus, petitioners' assertion (Pet. 9) that their interests were not represented below only underscores that they were obliged to step in at that time and assert those rights. See *NAACP* v. *New York*, 413 U.S. at 366-368. In this regard, we note that petitioners did not seek to intervene to appeal, but to reopen the litigation in district court. See Motion to Intervene as Plaintiffs, at 4-5; Amended Motion to Intervene, at 1, 3.

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